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UNITED STATES DISTRICT COURT

20 CENTRAL DISTRICT OF CALIFORNIA

21 WESTERN DIVISION

22 SONY CORPORATION,

23 Plaintiff,

vs.

24 VIZIO, INC.,

25 Defendant.

26 CASE NO. CV08-1135 RGK (FMOx)

27 **DISCOVERY MATTER**

28 **SONY'S SUPPLEMENT BRIEF RE:
MOTION TO COMPEL A
FURTHER RESPONSE TO SONY'S
INTERROGATORY NO. 20**

Hearing Date: October 28, 2009

Hearing Time: 10:00 a.m.

Before: Hon. Fernando M. Olguin

1 Sony's motion to compel should be granted, and Vizio should be required to
 2 provide a full and complete response to Sony's Interrogatory No. 20, regarding
 3 Vizio's claimed product disparagement and Lanham Act damages, without any
 4 further delay.

5 Vizio does not argue that any portion of Sony's damages interrogatory seeks
 6 irrelevant information or is otherwise improper in any respect. Yet Vizio offers no
 7 serious justification for its failure to provide any answer to a proper interrogatory
 8 served on it on June 12, 2009, more than four months ago. Amazingly, Vizio's
 9 principal argument, made October 7—fewer than four weeks before the close of fact
 10 discovery—is that Sony's interrogatory “is premature at this time.” (Docket No.
 11 126-2 at 3 (Joint Stipulation re: Motion to Compel).)

12 For a number of reasons, Vizio is wrong and has no justification for its
 13 protracted refusal to provide necessary discovery.

14 1. The parties agree that New Jersey law applies to Vizio's product
 15 disparagement claim against Sony. (Docket No. 113 at 13, 17, 18 (Vizio Opp. to
 16 Sony Motion for Judgment on the Pleadings).) Under New Jersey law, proof of
 17 “special damages” (Docket No. 126-2 at 3-4 (Sony Interrogatory No. 20, seeking
 18 information about special damages)) is not relevant merely to the extent of a
 19 plaintiff's remedy. Instead, it is an essential element of a plaintiff's product
 20 disparagement claim itself, subjecting a plaintiff to dismissal or summary judgment
 21 for failure to provide the very information that Sony Interrogatory No. 20 seeks: “A
 22 trade libel or product disparagement claim . . . requires that a prevailing plaintiff
 23 prove special damages by establishing pecuniary loss that has been realized or
 24 liquidated, such as lost sales, or the loss of prospective contracts with customers.”
 25 *Graco v. PMC Global, Inc.*, 2009 WL 904010, at *35 (D.N.J. March 31, 2009).

26 2. Vizio has attempted to satisfy this special damages requirement by
 27 alleging that the statements of a Sony executive that it challenges forced Vizio to

1 spend money on corrective television advertising. (Docket No. 113 at 16 (quoting
 2 Vizio Compl. ¶ 124).)

3 In opposition to this motion to compel, Vizio asserts that its product
 4 disparagement damages “involve abstract concepts” (Docket No. 126-2 at 3), and
 5 thus could not have been answered over the last four months. But Vizio’s assertion
 6 here is directly contradicted by Vizio’s assertion last month, in opposition to Sony’s
 7 motion for judgment on the pleadings, where Vizio argued that it had adequately
 8 alleged special damages in the form of “mitigation costs that include Vizio’s
 9 expenditures for corrective advertising to counteract Sony’s statements.” (Docket
 10 No. 113 at 16.) These are not “abstract concepts.”

11 3. Accordingly, Vizio has, and has had for months, all the information it
 12 needs in order to answer Interrogatory No. 20’s request that Vizio set forth “all
 13 evidence on which you base” the corrective-advertising damages and “an
 14 explanation of how you computed the item of damages.” (Docket No. 126-2 at 3-
 15 4). Such easily accessible information includes, at a minimum, concrete categories
 16 of information such as advertising agency and media-placement invoices. By
 17 withholding this information for months, Vizio has deprived Sony of the opportunity
 18 to test Vizio’s assertions through fact discovery. Vizio’s contention that its plan
 19 ultimately to answer the interrogatory “before expert depositions” means that “Sony
 20 will suffer no prejudice” (Docket No. 126-2 at 3) is, therefore, wrong.

21 4. That Vizio has no excuse for failing to provide basic information about
 22 the cost of its alleged corrective advertising is confirmed by the case Vizio itself
 23 cites in opposition to the motion to compel. In *Cable & Computer Technology, Inc.*
 24 v. *Lockheed Saunders, Inc.*, 175 F.R.D. 646 (C.D. Cal. 1997), the defendant moved
 25 to compel an answer to a similar damages interrogatory, which asked the plaintiff to
 26 describe each component of damages it allegedly suffered and to state the dollar
 27 value of each component and how the dollar value was calculated. *Id.* at 650-51 &
 28 n.3. Vizio quotes out of context a passage from *Cable & Computer Technology* for

1 the proposition that ““it is too early for plaintiff to provide expert opinions on the
2 subject of damages”” (Docket No. 126-2 at 12-13 (quoting *Cable &*
3 *Computer Tech.*, 175 F.R.D. at 652)). In context, the language makes clear that the
4 possibility of expert testimony on damages is not an excuse for failing to provide an
5 answer on the subject. Thus, granting the defendant’s motion to compel, the *Cable*
6 & *Computer Technology* court held: “[A]lthough it is too early for plaintiff to
7 provide expert opinions on the subject of damages, *plaintiff, may, at this time,*
8 *answer interrogatory no. 1 based on the information it has to date.*” 175 F.R.D. at
9 652 (emphasis added to parts of passage omitted by Vizio).

10 * * *

11 For the reasons set forth in Sony’s portion of the parties’ Joint Stipulation and
12 herein, Sony respectfully requests that the Court grant Sony’s motion to compel in
13 its entirety.

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15 DATED: October 14, 2009

WILLIAMS & CONNOLLY LLP

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By /s/ Thomas G. Hentoff

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